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Public Prosecutor v Krishnan a/l Letchumanam & Anor

HIGH COURT (TAIPING) — CRIMINAL TRIAL NO 58–4 OF 1994
ZULKEFLI J
16 AUGUST 2005

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Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Agent provocateur, use of — Whether defence had created reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)

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The two accused persons ('OKT1' and 'OKT2') were charged with trafficking in dangerous drugs, to wit, cannabis weighing 471.75 grammes, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code and punishable under s 39B(2) of the Act. The case for the prosecution revolved around the role of two agent provocateurs in their dealings with the alleged sale transaction of the cannabis by OKT1 and

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OKT2. Chief Inspector Mohd Zorki bin Saad ('SP5'), the agent provocateur in his evidence stated that he and Detective Sargeant Major Saidin ('Saidin') through Detective Corporal Aziz met an informer at the Rest House where they were briefed by the said informer about a male Indian who was trafficking in cannabis. SP5 then requested the informer to introduce himself

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and Saidin to the male Indian as the would-be buyer and with a view to arresting him thereafter. Having ruled that the prosecution had made out a *prima facie* case on the charge framed, OKT1 and OKT2 were called upon to enter their defence.

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Held, acquitting and discharging both OKT1 and OKT2 on the charge framed against them:

(1) Having studied the evidence of OKT1 and OKT2, the court found that both OKT1 and OKT2 in their defence had given explanations which have created a reasonable doubt on the prosecution's case. The prosecution

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at the conclusion of the trial has failed to prove its case beyond reasonable doubt against both OKT1 and OKT2 (see para 10).

(2) The prosecution's case relating to the issue on the negotiation of the sale and purchase of the drugs through the evidence of SP5 was highly improbable. SP5 in his evidence stated that the whole discussion on the

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sale and purchase of the drugs outside the car was not in the present of the informer. According to the defence, the car was parked 25 feet away and there were a lot of people around the area. It was highly improbable for SP5 to enter into negotiation and talked about the price for about 15 minutes in public for OKT2 to come and show a packet of drugs in

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public and for the informer to sit in the car for 15 minutes and when they left the scene the informer never wished OKT1 and OKT2 who were supposed to be his friends. SP5 may be a credible witness but in

this case the inherent probability or improbability of a fact in issue must be the prime consideration (see paras 12, 13 and 14).

(3) The role of the informer known as 'Nan' as suggested by the defence in the stage of the prosecution's case wherein the informer was said to have played an active role during the negotiation and delivery of the drugs together with the issue relating to the existence of an Indian male named 'Joe' at the scene of the incident had also affected the truth of the prosecution's case (see para 15). Since in this case after the close of the defence's case, the prosecution had not made any application to call for evidence of rebuttal because of the part played by the informer, then the provision of adverse presumption under s 114(g) of the Evidence Act 1950 should be invoked against the prosecution case. The part played by the informer 'Nan' strikes at the very core of the prosecution case. It was material that the prosecution should have called the informer 'Nan' to give evidence for the prosecution (see para 16).

(4) The prosecution cannot rely on the provision of s 40 of the Act on the protection of the informer. The defence had put in categorically the name and address of the informer 'Nan'. The prosecution did not adduce any evidence that this male person 'Nan' was not the informer. The informer had lost his protection as his identity was no longer a secret. The informer 'Nan' had assumed the position as an agent provocateur by putting both OKT2 and OKT2 to be in touch with SP5 and Saidin which resulted in them being arrested. The veil had certainly been lifted against the informer (see para 17).

(5) It was clear that OKT1 did not know what was inside the plastic bag. There was no circumstantial evidence for inferences to be made that OKT2 knew what was inside the plastic bag (see para 18).

(6) There cannot be common intention between OKT1 and OKT2 as there was no negotiation on the sale and purchase of the drugs and that the evidence as alleged against SP5 was highly improbable. Mere presence of OKT2 at the scene was not sufficient. There must be a link between the two accused persons and the recovery of the drugs (see para 19).

[**Bahasa Malaysia summary**

Dua orang tertuduh ('OKT1' dan 'OKT2') telah dituduh mengedar dadah berbahaya, iaitu kanabis seberat 471.75 gram, satu kesalahan di bawah s39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'), dibaca bersama s34 Kanun Keseksaan dan boleh dihukum di bawah s 39B(2) Akta itu. Kes pendakwaan melibatkan peranan dua 'agent provocateur' dalam transaksi jualan kanabis itu oleh OKT1 dan OKT2. Ketua Insp Mohd Zorki bin Saad ('SP5'), 'agent provocateur' dalam pernyataannya berkata dia dan detektif

Sarjan Major Saidin ('Saidin') melalui Detektif Korporal Aziz telah berjumpa dengan seorang 'informer' di Rest House di mana mereka diberitahu oleh 'informer' itu mengenai seorang lelaki India yang sedang mengedar kanabis. SP5 kemudiannya meminta 'informer' untuk memperkenalkan diri sendiri dan Saidin kepada lelaki India itu sebagai seorang pembeli dengan tujuan menangkap lelaki India itu. Setelah mendapati bahawa pendakwaan telah membuktikan kes p*rima facie* atas tuduhan itu, OKT1 dan OKT2 dipanggil untuk memasuki pembelaan.

Diputuskan, melepaskan dan membebaskan kedua-dua OKT1 dan OKT2 atas tuduhan terhadap mereka:

(1) Setelah meneliti keterangan OKT1 dan OKT2, mahkamah mendapati bahawa kedua-dua OKT1 dan OKT2 dalam pembelaan mereka telah memberi keterangan yang meletakkan satu keraguan munasabah ke atas kes pendakwaan. Pendakwaan pada akhir pembicaraan telah gagal membuktikan kes di luar keraguan munasabah terhadap kedua-dua OKT1 dan OKT2 (lihat perenggan 10).

(2) Kes pendakwaan mengenai isu rundingan jual beli dadah itu melalui keterangan SP5 tidak mungkin berlaku. SP5 dalam keterangannya menyatakan bahawa keseluruhan perbincangan mengenai jual beli dadah itu berlaku di luar kereta tidak di hadapan 'informer'. Menurut pembelaan, kereta itu diletak sejauh 25 kaki dan terdapat ramai orang ditempat itu. Adalah tidak mungkin bagi SP5 memasuki perundingan dan berunding harga untuk 15 minit di tempat awam dan untuk OKT2 datang dan menunjukkan paket dadah, dan bagi 'informer' yang duduk di dalam kereta selama 15 minit dan apabila mereka meninggalkan tempat itu 'informer' tidak pernah tegur OKT1 dan OKT2 yang sepatutnya kawannya. SP5 kemungkinan seorang saksi yang boleh dipercayai tetapi dalam kes ini kemungkinan atau ketidakmungkinan fakta dalam isu mesti dianggap sebagai penting (lihat perenggan 12, 13 and 14).

(3) Peranan 'informer' yang dikenali sebagai 'Nan' seperti yang dicadangkan oleh pembelaan pada tahap kes pendakwaan di mana 'informer' dikatakan mempunyai peranan yang aktif dalam perundingan dan penyerahan dadah bersama dengan isu berkaitan dengan kewujudan seorang lelaki India bernama 'Joe' pada tempat kejadian juga telah menjejaskan kebenaran kes pendakwaan (lihat perenggan 15). Oleh kerana dalam kes ini selepas penutup kes pembelaan, pendakwaan tidak membuat apa-apa permohonan memanggil untuk keterangan bantahan kerana peranan yang dimainkan oleh 'informer', peruntukan anggapan bertentangan di bawah s114(g) Akta Keterangan 1950 sepatutnya digunakan terhadap kes pendakwaan. Peranan yang dimainkan oleh 'informer' 'Nan' menjejaskan teras kes pendakwaan. Adalah matan bahawa pendakwaan sepatutnya memanggil 'Nan' untuk memberi keterangan untuk pendakwaan (lihat perengggan 16).

(4) Pendakwaan tidak boleh bergantung kepada peruntukkan s 40 Akta itu untuk melindungi 'informer'. Pembelaan telah memasukkan secara kategori nama dan alamat 'informer' 'Nan'. Pendakwaan tidak memberi sebarang keterangan bahawa lelaki itu 'Nan' bukan seorang 'informer'. 'Informer' telah hilang lindungannya kerana identitinya bukan lagi satu rahsia. 'Informer' 'Nan' telah menjadi seorang 'agent provocatuer' apabila memperkenalkan OKT1 dan OKT2 kepada SP5 dan Saidin yang menyebabkan mereka ditangkap. Tabir telahpun diselak terhadap 'informer' itu (lihat perenggan 17).

(5) Adalah jelas bahawa OKT1 tidak tahu apa yang terkandung dalam beg plastik itu. Tiada keterangan mengikut keadaan untuk membuat inferens bahawa OKT2 tahu apa yang terkandung dalam beg plastik itu (lihat perenggan 18).

(6) Tidak boleh ada tujuan bersama di antara OKT1 dan OKT2 kerana tiada perundingan jual beli dadah dan keterangan yang dikatakan terhadap SP5 adalah tidak berkemungkinan tinggi. Sekadar kehadiran OKT2 pada tempat kejadian tidak mencukupi. Satu kaitan mesti wujud di antara kedua-dua tertuduh dan penemuan dadah itu (lihat perenggan 19).]

Notes

For cases on the trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 121–123.

Cases referred to

Muniandy & Ors v PP [1966] 1 MLJ 257 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 39B(1)(a), (2)
Evidence Act 1950 s 114(g)
Penal Code s 34

Kumaraendran (Kumar, Sitham & Co) for the accused persons.
Abdul Hakim Amir (Nor Azura bte Mohd Mokhtar with him) (Deputy Public Prosecutor) for the prosecution.

Zulkefli J:

THE CHARGES

[1] The two accused persons were charged with trafficking in dangerous drugs, to wit, cannabis weighing 471.75 grammes at about 9.45pm on 21 July

1991 at Jalan Keretapi, Kampong Station, Kuala Kangsar, in the district of Kuala Kangsar, Perak, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) ('Act') read with s 34 of the Penal Code and punishable under s 39B(2) of the same Act.

THE CASE FOR THE PROSECUTION

[2] The version of the case for the prosecution revolves around the role of two agent provocateurs in their dealings with the alleged sale transaction of the cannabis by the two accused persons. Chief Inspector Mohd Zorki bin Saad ('SP5'), the agent provocateur in his evidence stated that on 21 July 1991 at about 4.15pm he and Detective Sargeant Major Saidin ('Saidin') through Detective Corporal Aziz met an informer at the Rest House in Kuala Kangsar, Perak where they were briefed by the said informer about a male Indian who was trafficking in cannabis at Kampong Station in Kuala Kangsar. SP5 then requested the informer to introduce himself and Saidin to the male Indian as the would-be buyer and with a view to arresting him thereafter.

[3] At about 4.30pm on the same day SP5, Saidin and the informer left the Rest House by car No BBA 522 for Kampong Station, Kuala Kangsar to meet the male Indian. They met the male Indian outside an Indian Temple where the informer introduced SP5 and Saidin as the buyer of the cannabis. The male Indian introduced himself as Krishnan who is the first accused person ('OKT1'). OKT1 later introduced the second accused ('OKT2') to SP5.

[4] Negotiation for the purchase of the cannabis and the price was held between SP5 and OKT1. OKT2 later brought a plastic packet containing the said cannabis and handed it over to SP5 who after seeing it agreed to buy at the price of RM67 per packet. OKT1 wanted to sell the cannabis immediately after the negotiation but SP5 did not agree but instead told OKT1 that he would be coming again to the same place to buy the said cannabis from OKT1 between 9.30pm and 10pm that night on 21 July 1991. OKT1 agreed with SPS's proposal but told SP5 to come to the place not by car but by using a motorcycle.

[5] After this meeting with the two accused persons SP5, Saidin and the informer went back to the Rest House in Kuala Kangsar. SP5 then directed Detective Corporal Aziz to send the informer back to his house and according to the prosecution the informer's role in this case ended here. Meanwhile SP5 then briefed and prepared his ambush team to effect the arrest of the two accused persons at their scheduled meeting that night on 21 July 1991.

[6] SP5 and Saidin came to the scene of the incident that night on 21 July 1991 by motorcycle and at the same time the other members of the police party took their ambush position which was between the house No 316, Kampong Station, Kuala Kangsar and a railway godowm near a railway Station. When SP5 and Saidin met the two accused persons again a short discussion

took place between SP5 and OKT1 over the sale transaction of the said cannabis. OKT2 was thereafter seen to have gone to the railway godown nearby and soon later OKT2 came back riding a bicycle and carrying a plastic bag containing the said cannabis. OKT2 later handed the plastic bag to SP5. Having satisfied himself that the plastic bag contained cannabis SP5 then made a remark to the two accused persons by stating the word 'Polis'. OKT1 and OKT2 tried to escape but with the assistance of the other members of the police ambush team at the scene both of them were subdued and arrested.

[7] Having ruled that the prosecution has made out a *prima facie* case on the charge framed, both the accused persons were called upon to enter their defence. Both the accused persons gave evidence on oath.

THE CASE FOR THE DEFENCE

[8] The first accused ('OKT1') gave evidence essentially on the following relevant facts:

> On 21 July 1991 at about 2.30pm OKT1 was at the Indian Temple at Kampong Station, Kuala Kangsar. An informer known as 'Nan' to OKT1 came together with a Malay man ('SP5') to see OKT1. OKT1 on meeting Nan was introduced to this Malay man known as 'Zul', The three of them went towards a car waiting nearby and Nan introduced another Malay man to OKT1. Nan then asked OKT1 whether OKT1 knew the location of the house of a person known as 'Joe'. According to OKT1 he informed the informer and the two Malay men that he knew Joe's house but did not know whether Joe was selling drugs. Nan informed OKT1 that he would come at night on the same day for OKT1 to show him Joe's house. At all material times the second accused ('OKT2') was with OKT1 but OKT2 did not talk to anybody. OKT1 denied having discussion with Zul (SP5) on the sale of drugs and also denied showing a packet of drug to SP5.
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> On that same night Nan came to see OKT1 and OKT1 brought Nan, SP5 and the other said Malay man to Joe's house. SP5 and (the other said Malay man stopped some where on the way towards Joe's house. SP5 thereafter told Nan, OKT1 and OKT2 for the three of them to proceed together towards Joe's house. On reaching Joe's house Nan went inside the house and later came out with a green plastic bag. Nan, OKT1, OKT2 together with Joe later walked towards the place where SP5 and the other Malay man were waiting. As they reached the place Nan handed over the green plastic bag to SP5 and said that he would be calling Joe who was at the back. After that OKT1 and OKT2 were arrested by the police party. OKT1 stated that he did not know the contents of the said green plastic bag.

[9] The second accused ('OKT2') gave evidence on oath on the following relevant facts:

> On 21 July 1991 at about 2.30pm he was at the Indian Temple at Kampong Station, Kuala Kangsar. OKT2 followed OKT1 after having seen a Malay man waving his hands towards OKT1. OKT2 denied having been introduced to the

Malay man ('SP5') or having heard any discussion between OKT1 and SP5. OKT2 also denied having delivered any thing to SP5 at both meetings during the day and at night of the said incident. OKT2 admitted he had followed OKT1 when they met SP5 and Saidin at the said two meetings. OKT2 supported OKTl's evidence in stating that on the night of 21 July 1991 Nan, OKT1 and OKT2 went to Joe's house and Nan entered Joe's house and later came out holding a plastic bag. The four of them OKTl, OKT2, Nan and Joe then walked back towards SP5 and Saidin who were waiting and Nan was seen delivering the said plastic bag to SP5. OKT2 was thereafter arrested and OKT2 denied knowing the contents of the said plastic bag.

DECISION OF THE COURT

[10] Having studied the evidence of OKT1 and OKT2, it is my finding that both OKT1 and OKT2 in their defence had given explanations which have created a reasonable doubt on the prosecution's case. I have reviewed all the evidence presented before the Court by the prosecution and the defence and find that the prosecution at the conclusion of the trial has failed to prove its case beyond reasonable doubt against both OKT1 and OKT2.

[11] I hereby made an order acquitting and discharging both OKT1 and OKT2 on the charge framed against them. The following are my grounds in acquitting and discharging both the accused persons:

[12] It is my finding that the prosecution version relating to the issue on the negotiation of the sale and purchase of the drugs through the evidence of SP5 is highly improbable. The evidence of SP5 on this issue of negotiation appears to be the substratum of the prosecution case in showing the negotiation for the sale and purchase of drugs allegedly cairied out by SP5 and Saidin with OKT1 and OKT2. SP5 in his evidence stated that the whole discussion on the sale and purchase of the drugs outside the car was not in the present of the informer. According to the defence the car was parked outside the temple 25feet away and there were a lot of people around the area. The question to be posed here is it probable for SP5 to enter into negotiation and talked about the price for about 15 minutes in public. Is it again probable for OKT2 to come and show a packet of drugs in public. In my view this fact is highly improbable.

[13] I also find on the prosecution evidence alone the informer never introduced SP5 and Saidin to OKT1 and OKT2 and that SP5 and Saidin are buyers of drugs and that they are share partners from Ipoh. What was adduced in evidence by SP5 was that the informer introduced SP5 as 'Chin' and then the informer walked towards the car and got into the car and stayed there for about 15 minutes. It was then as stated in the prosecution case that SP5 straight away asked 'Ada barang kah'. It must be noted then that as far as OKT1 and OKT2 are concerned SP5 and Saidin are strangers to them. It is my view that it is highly improbable for the informer to sit in the car for

15minutes and when they left the scene the informer never wished OKTl and OKT2 who were supposed to be his friends.

[14] SP5 may be a credible witness but in this case the inherent probability or improbability of a fact in issue must be the prime consideration. (See the case of *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257). In the circumstances of this case it is my finding that SPS's evidence on the negotiation of the alleged sale and purchase of the drugs is highly improbable.

[15] The role of the informer known as 'Nan' as suggested by the defence in the stage of the prosecution's case wherein the informer was said to have played an active rote during the negotiation and delivery of the drugs together with the issue relating to the existence of an Indian male named 'Joe' at the scene of the incident in my view has also affected the truth of the prosecution's case.

[16] It is to be noted that the defence had suggested in the prosecution case the part played by the informer at the time of the delivery of the drugs and also the existence of one male Indian named 'Joe'. Although this suggestion was denied by the prosecution witnesses, the Court could not have considered at that stage of the prosecution case the role played by the informer and Joe, However, this suggestion has been crystallized into evidence when OKT1 and OKT2 gave evidence in respect of the defence version of the case. (See the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705). It would be prudent for the prosecution to negative this suggestion put by the defence on the prosecution case. Since in this case after the close of the defence case the prosecution had not made any application to call for evidence of rebuttal because of the part played by the informer, then the provision of adverse presumption under s 114(g) of the Evidence Act 1950 should be invoked against the prosecution case. The part played by the informer 'Nan' strikes at the very core of the prosecution case. It is material that the prosecution should have called the informer 'Nan' to give evidence for the prosecution.

[17] It is my view that the prosecution in this case cannot rely on the provision of s 40 of the Act on the protection of the informer. In this present case the defence had put in categorically the name and address of the informer 'Nan'. The prosecution did not adduce any evidence that this male person 'Nan' is not the informer. It is my finding that in this case the informer has lost his protection as his identity is no longer a secret. The said informer has assumed the position as an agent provocateur by putting both the accused persons OKT1 and OKT2 to be in touch with SP5 and Saidin which resulted in them being arrested. The veil has certainly been lifted against the informer in this case. (See the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433).

[18] In the event that the evidence of SP5 is not accepted in relation to the subject matter on the alleged negotiation of the sale and purchase of the said drugs, then the only evidence remaining is the fact that OKT1 and OKT2

were arrested wherein OKT2 was said to have delivered a plastic bag containing drugs to SP5. It is clear that OKT1 did not know what was inside the plastic bag. There are no circumstantial evidence for inferences to be made that OKT2 knew what was inside the plastic bag. On this point it is also necessary for the Court to take into consideration the evidence relating to the existence of the Indian male named 'Joe' who appeared to be the source from where the said plastic bag containing the drugs was obtained as alleged by the defence. It must be noted here that 'Joe' as contended by the defence is not a fictitious person. Both OKT1 and OKT2 had stated in their evidence that 3 Indian male were arrested at about 1.30 am on 22 July 1991, a few hours after the incident in the present case. This fact was confirmed by SP10 the investigating officer in the prosecution case. Both OKT1 and OKT2 further stated in evidence that one of the three Indian male arrested on that day was 'Joe' and they both saw 'Joe' at the police station.

[19] OKT1 and OKT2 were charged with common intention under s 34 of the Penal Code for an offence of trafficking in the said drugs under the Act. It is my view that there cannot be common intention between OKT1 and OKT2 in view of my earlier finding that there was no negotiation on the sale and purchase of the drugs taking place and that in this respect the evidence as alleged against SP5 is found to be highly improbable. Mere presence of OKT2 at the scene is not sufficient. There must be a link between the two accused persons and the recovery of the drugs. In this case there is the evidence of SP5 that OKT2 never speak to SP5. In any event there was an unchallenged evidence that OKT2 did not hear anything during the alleged negotiation of the sale and purchase of the drugs because of the loud noise at the temple. OKT2's explanation that he was at OKT1's house at 9.30 pm that night was to return the bicycle to OKT1 and I find this is a reasonable explanation.

Both accused acquitted and discharged.

Reported by Peter Ling